APPEAL NO. 93383

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On April 19, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) did not reach maximum medical improvement (MMI) until November 16, 1992, but that claimant did not have disability during the period April 15, 1992, to November 16, 1992. Claimant asserts error in certain findings and conclusions in attacking the determination that disability did not continue from April 15 to November 16, 1992. Respondent replies that there was sufficient evidence to uphold the decision.

DECISION

Finding that the decision and order are sufficiently supported by the evidence, we affirm.

There was no issue as to injury. The hearing officer relates that claimant fell as she was pushing a laundry cart while working for the (employer). The only issues were the date of MMI and the disability period. The injury was specified as occurring on (date of injury). Claimant saw a doctor about her back four days after the accident. She then began to see (Dr. G) on August 8, 1991 and testified that she has been "disabled" from August 8, 1991 to the present time. She said that the carrier sent her to see both a woman and man doctor, but she could not remember when. She stated that Dr. G continues to keep her off work and she has not worked since the injury. She described her symptoms as pain in the lower back, inability to sit or walk for a long period, plus limitations on bending and lifting. She stated that Dr. G has given her injections and pills over the course of her treatment. She agreed that various testing had been performed in regard to her problem and that she had been to work hardening. She recalled seeing (Dr. C) on behalf of the carrier and (Dr. P), the designated doctor. She does not feel that she can return to work.

Claimant's back was x-rayed; they were negative. Claimant had an MRI in September 1991; it showed a slight bulge at L4-5. Claimant had a nerve conduction study and electromyography on August 30, 1991; they were normal. Claimant had a CT scan and myelogram in October 1991; they showed no abnormality.

Dr. C saw claimant on October 16, 1991, and characterized the MRI as negative for ruptured discs--he did refer to the L4-5 area as "degenerated." Dr. C deferred his conclusion about claimant until the myelogram and CT scan were accomplished. On November 27, 1991, Dr. C referred to having received a negative myelogram and CT scan on claimant and said that she could return to work. He also said that she had reached MMI with no impairment and prepared a Form TWCC-69 indicating his conclusion as to MMI and impairment.

Dr. G saw claimant at least monthly from August 1991 through October 1992. He

treated claimant with shots and other medication. He tried physical therapy and referred claimant to a neurosurgeon, (Dr. M). Dr. M saw claimant in January 1992, examined her, referred to the testing done (including stating that the MRI showed a slight bulge), and concluded: "The impression is probable chronic lumbar instability, rule out bilateral lumbar radiculopathy left greater than right, herniated disc, or other lesion."
Dr. M called for continued conservative treatment. Dr. G, after receiving Dr. M's report, referred claimant to work-hardening.

After claimant completed work-hardening on April 14, 1992, Dr. G wrote a letter on May 11, 1992, indicating that he had seen claimant on April 14, 1992, and that she had shown "gradual improvement" in the work-hardening program. He continued: "Her treatment plan comprised of continuation of the work hardening program. An injection of dexamethasone, robaxin was given and a prescription for some oral medicines. A follow-up appointment was given. She will remain off of work until further evaluation."

The work-hardening note of April 14, 1992, which showed that claimant had completed the work-hardening program was signed by a physical therapist, whose name appears to be J. Engel. That note showed that claimant was referred back to her doctor for consideration of whether she should return to work, but the note earlier stated:

Objectively the Pt. demonstrates physical capabilities sufficient to perform like and similar activities as described in the job description of the 3-2-92 evaluation. The patient maintained the complaints of pain as mentioned earlier.

Claimant was referred by Dr. G to (Dr. R) for an orthopedic evaluation according to Dr. G's letter of July 23, 1992. Dr. G in a later, undated, letter again mentions that referral, but never says what the result was; no records of Dr. R are included in the medical records admitted at the hearing.

Claimant saw Dr. P, the designated doctor, on November 16, 1992. He examined her and considered her medical records. He concluded that she reached MMI on November 16, 1992, with a 5% impairment. Claimant does not contest the designated doctor's opinion.

The carrier argued that in a letter dated December 15, 1992, Dr. P stated that the claimant may have reached MMI in November 1991 (when Dr. C had found MMI). We note that Dr. P also says in that letter, "[s]ince I did not see the patient at that interval, I have more than some difficulty commenting on what may have been her clinical status at that interval."

There is no appeal as to the finding that claimant reached MMI on November 16, 1992, with a 5% impairment rating. Claimant does assert that there was no medical record showing that any physician said claimant could return to work on April 15, 1992, and an end

of disability should not be based on the opinion of a physical therapist. Claimant adds that the claimant's treating doctor is in the best position to determine when she should return to work and Dr. G did not return claimant to work when he received the notice of completion of work-hardening. (Claimant attached three "exhibits" to the appeal--we note that the first two appear to be copies of materials contained in records admitted at the hearing and, as such, were considered because all the record of hearing was considered. Claimant's "exhibit" 3, reflecting a designation of a doctor named Fisher, was not included in the record of hearing and, under the circumstances, will not be considered on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91132, dated February 14, 1992.)

The Appeals Panel has stated that all medical evidence and lay witness testimony may be considered in making findings in disability questions. *See* Texas Workers' Compensation Commission Appeal Nos. 91024, 91045, 92147, and 92167, dated October 23, 1991, November 21, 1991, May 29, 1992, and June 11, 1992, respectively. In the case before us, there was medical evidence that claimant's period of disability ended prior to the determination of MMI, dated November 16, 1992; Dr. C had said that claimant could return to work in November 1991. While the hearing officer was charged by Article 8308-4.25 of the 1989 Act with determining whether to assign a presumption to the opinion of the designated doctor as to MMI, there is no statutory presumption attached to any doctor's opinion in regard to the separate issue of disability. The hearing officer could attach weight to the opinion of Dr. C as to when claimant could return to work in making her decision as to disability, notwithstanding that she did not accept Dr. C's date as to when claimant reached MMI. The treating doctor, Dr. G, had a different opinion from Dr. C as to when claimant could return to work. In addition, the claimant testified that she could not return to work. As an interested witness, the claimant's testimony was not required to be accepted (*See* Presley v Royal Indem. Ins. Co., 557 S.W.2d 611 (Tex. Civ. App.-Texarkana 1977, no writ), but may be weighed by the hearing officer. Similarly, the hearing officer could weigh other evidence, medical or lay, such as that contained in the physical therapist's report of the completion of work-hardening that said claimant was capable of performing work. None of the appeals panel opinions, cited above, require that questions of disability be determined only from the opinion of the treating doctor.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. While pain may be considered in determining whether a claimant cannot work, *see* Appeal No. 91024, *supra*, the hearing officer is not required to find that disability has continued just because there is testimony that pain continued. The hearing officer, as fact finder, could choose to give more weight to the evidence of one physician than to that of another. *See* Atkinson v. U.S. Fidelity & Guaranty Co., 235 S.W.2d 509 (Tex. Civ. App.-San Antonio 1950, writ ref'd n.r.e.). The claimant in the appeal says, "[t]he discretion given the Hearing Officer in Contested Case Hearing (sic) before the 'Commission' is massive and dangerous." The appeals panel notes that the responsibility to be the "sole judge" of the evidence is placed on the hearing officer by the

1989 Act; the power of a fact finder to weigh evidence, including medical evidence, predated the 1989 Act, as shown by Atkinson, *supra*. In the circumstances of the case on appeal, the hearing officer did not find that disability ended in November 1991, as Dr. C's opinion stated, but could still consider that same opinion, together with the later report of the completion of work-hardening, in deciding that claimant had not shown disability continuing beyond April 14, 1992. The evidence is sufficient to support the hearing officer's findings that claimant was capable of working upon completion of a work-hardening program and that claimant was not unable to obtain and retain employment after April 14, 1992. These findings sufficiently support the conclusion of law that claimant had disability from November 27, 1991 to April 14, 1992, but did not have disability after April 14, 1992.

The decision and order are sufficiently supported by the evidence and are affirmed.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Gary L. Kilgore
Appeals Judge